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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1969**

**No. ---- 443**

CONTINENTAL INSURANCE COMPANY,
*Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

FREDERICK T. SHEA,
*Attorney for Petitioner,*
350 Park Avenue,
New York, New York 10022.

IRVING BRAND
KELLEY DRYE NEWHALL MAGINNES
& WARREN,
*Of Counsel.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

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CONTINENTAL INSURANCE COMPANY,
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NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case entered on May 12, 1969.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit printed in Appendix B hereto, *infra,* pp. 3a-8a, is reported at 409 F. 2d 727, 70 L. R. R. M. 3406. The Decision and Direction of Elections of the National Labor Relations Board ("Board") in the underlying representation case (J. A. 216-226)[1] is reported at 169 NLRB No. 85, 67 L. R. R. M. 1233 and is printed in Appendix B hereto, *infra,* pp. 20a-30a. The Decision and Order of the Board (J. A. 254-262) is reported at 172 NLRB No. 48, 69 L. R. R. M. 1106 and is printed in Appendix B hereto, *infra,* pp. 11a-19a.

[1] "J. A." refers to the Joint Appendix printed for the use of the court below and filed with this petition.

## JURISDICTION

The Court of Appeals entered its judgment on May 12, 1969 (Appendix B, *infra*, p. 9a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 160(e)).

## QUESTION PRESENTED

What are the relevant factors the Board may consider and what weight may it properly give to each in determining the appropriateness of a bargaining unit limited to a single branch in a closely knit, centrally controlled multi-branch operation?

## STATUTES INVOLVED

The statutory provisions involved are Sections 7, 8(a)(1), 8(a)(5), 9(b), 9(c)(5), 10(e) and 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. §§ 157, 158(a)(1), 158(a)(5), 159(b), 159(c)(5), 160(e) and 160(f). They are set forth in Appendix A hereto, *infra*, pp. 1a-2a.

## STATEMENT OF THE CASE

### I. History of the Proceedings

In May, 1967, the American Communications Association, Communications Trade Division, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Union") filed with the Board two representation petitions which the Board consolidated for purposes of hearing (J. E. 49).[2] In the first petition, the Union sought to be certified as collective bargaining representative of a unit consisting of Claims Adjusters and Claims Examiners at petitioner's New York City branch claims office, which is one of three branch offices in petitioner's Metropolitan Department (J. A. 3). In the other petition, as amended, the Union sought to be certified as collective bargaining representative of separate units consisting of Claims Adjusters, Claims Examiners and Investigators at petitioner's branch claims offices in Newark and Perth Amboy, New Jersey, which are two of nine branch offices in petitioner's Middle Department (J. A. 5). The Board held that Claims Adjusters, Examiners and Investigators under the supervision of minor supervisors, called Branch Claims Managers, constituted separate appropriate bargaining units and directed separate elections in all three units.

The Union lost the election at Perth Amboy but won and was separately certified at both the New York and Newark offices. Petitioner refused to bargain with the Union in order to obtain, in the only way it can, judicial review of the validity and propriety of the Board's unit determina-

[2] "J. E." refers to the Joint Exhibits printed for the use of the court below and filed with this petition.

tions. After issuance of a complaint and the filing of petitioner's answer, the General Counsel of the Board moved for and was granted summary judgment. The Board held that petitioner violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended, and ordered petitioner to bargain with the Union.

On July 19, 1968, petitioner filed a petition, pursuant to Section 10(f) of the National Labor Relations Act, to have the United States Court of Appeals for the Second Circuit review and set aside the Board's order. Thereafter, the Board filed a cross-petition for enforcement, pursuant to Section 10(e) of the Act. The Second Circuit denied petitioner's petition for review and granted the Board's petition for enforcement.

## II. FACTS

### A. The Home Office

Petitioner is a New York corporation engaged in the sale and service of casualty, property and life insurance throughout the United States and Canada (J. A. 8-9; 217). Petitioner performs its general executive and staff functions at its Home Office in New York City, where all elements of its business policy are established (J. A. 9-13; 16-17).

High level officials in the Home Office formulate and control premium rates, terms and conditions of insurance, group employee benefits as well as standard procedure for processing loss claims (J. A. 9-13; 16; 28-29; J. E. 1). Most significantly, these officials also determine all personnel and labor relations policies. These policies are uniform throughout the United States (J. A. 12-13; 16; 28-29). In addition, personnel in the Home Office administer payrolls, issue checks and maintain personnel records, accounts and other important information for the entire company (J. A. 15-16; 128-129).

### B. Departmental Structure and Functions

Petitioner is divided into nine operating regional Departments servicing different geographic areas (J. A. 9; 217; J. E. 1).[3] Generally, each of these Departments issues insurance policies, underwrites insurance risks, and evaluates, adjusts and settles claims (J. A. 17).[4]

Heading each Department is a Departmental Manager, usually a Vice President, who bears overall responsibility for petitioner's business within his territory. Each of the various functions of each Department, such as underwriting or adjusting claims, is under the authority of a lower-level Manager, who is responsible on a "line" basis to the Manager of his Department, and on a "staff" basis to an official at the Home Office in charge of his particular operating function. Thus, for example, the Departmental Claims Manager in each Department is responsible concurrently to petitioner's National Vice President for claims and to the Manager of his regional Department for handling claims that arise within the Department (J. A. 31; 166).

Each Department processes, investigates, adjusts and settles claims through "branch" claims offices at various locations within the Department's territory. Each such branch claims office is supervised by a Branch Claims Manager who operates under the direction of, and is responsible to, the Departmental Claims Manager (J. A. 31; 84; J. E. 2).

### C. The Metropolitan Department

The Metropolitan Department is unique among petitioner's nine regional Departments. Both the compactness of its territory and its highly centralized organization emphasize that an appropriate unit for bargaining should include all three branch claims offices comprising it.

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[3] These are the Eastern, Metropolitan New York City ("Metropolitan"), Middle, Southeastern, Buckeye, Western, Southwestern, Pacific and Canadian Departments.

[4] The Metropolitan Department does not perform an underwriting function; Home Office personnel perform that function for it (J. A. 22).

The Metropolitan Department performs its claims functions through its Departmental Claims Office, which is located at petitioner's Home Office building in New York City. The Departmental Claims Office, under the supervision and control of Henry J. Gregory, consists of three branch claims offices located within 25 miles of each other and one suits office located in the Home Office building (J. A. 24-25; 29-30; 217; J. E. 2). The New York City branch claims office provides claims service for the five boroughs of New York City. The Huntington branch claims office services Nassau and Suffolk counties and the White Plains branch claims office services Westchester, Rockland and Putnam counties. The suits office, on the other hand, handles litigation for all three branch claims offices. Nowhere else in the company does a single suits office serve more than one branch claims office (J. A. 129-131).

For operational purposes, the Departmental Claims Office and the New York City branch claims office are one and the same (J. A. 30-31). Thus, the Departmental Claims Manager, Henry J. Gregory, functions as both the Departmental Claims Manager and the manager of the New York City branch claims office (J. A. 29). Similarly, the Assistant Departmental Claims Manager, Ambrose J. Brady, serves as Mr. Gregory's assistant in the New York City branch claims office (J. A. 30). In fact, unlike any other Departmental Claims Office, the Metropolitan Departmental Claims Office has no personnel of its own. It operates exclusively through employees assigned to the New York City branch claims office (*Ibid.*). As a result, the two Claims Supervisors and many of the Supervising Adjusters in the New York City branch claims office, in addition to functioning at the New York City branch level, regularly and continuously supervise, direct, approve, review and evaluate the work of and physically assist personnel at the Huntington and White Plains branch claims offices (J. A. 106-111; J. E. 23). Indeed, in the six months between November 4, 1966, and May 11, 1967, at the direction of Mr. Gregory, Claims Supervisors and Supervising Adjusters from the New York City branch office made 40 full-day visits, or about seven a month, to Huntington and White Plains for

just such purposes *(Ibid.)*. Furthermore, the Subrogation Unit in the New York City branch office processes all subrogation claims for the three branch offices of the Metropolitan Department (J. A. 78).

As Departmental Claims Manager, Henry Gregory actively directs and supervises the branch offices in New York City, Huntington and White Plains (J. A. 31). Mr. Gregory exercises substantial control over the personnel and labor relations policies at all three branches (J. A. 31; 111-114). With respect to all claims personnel, he makes the final decision concerning hiring, discharges, promotions, transfers, salary adjustments and the imposition of most forms of discipline (J. A. 111-114; 127-128; 219). In addition, Mr. Gregory reviews the vacation schedules of each branch office and orders such revisions as he deems necessary (J. A. 134). Furthermore, Mr. Gregory increases and decreases the monetary limitations of the settlement authority of all Adjusters, Supervising Adjusters and Branch Claims Managers within the Metropolitan Department regardless of the particular branch to which they are assigned (J. A. 129).

Mr. Gregory also actively directs and supervises the routine operations of the three branch offices (J. A. 31). He regularly and frequently receives various detailed personnel and operational reports from the branch offices (J. A. 31; 133-134). In addition, personnel records pertaining to all claims employees in all the Metropolitan branches are kept at the Departmental Claims Office (J. A. 132).

Mr. Gregory and other supervisory personnel at the New York City branch claims office daily supervise and control the handling of every claim at White Plains and Huntington that qualifies for "D. C. O. Reporting" (J. A. 93-99).[5] When a claim qualifies for "D. C. O. Reporting", Mr. Gregory and his New York City branch supervisors personally

[5] A claim qualifies for DCO Reporting if the financial reserve the Supervising Adjuster has established to cover the anticipated cost of settling it exceeds a specified dollar amount ranging from $500 to $15,000 depending upon the type of claim involved (J. A. 93; 96).

review all papers relating to that claim and evaluate the adequacy and progress of the satellite office's handling of the matter (J. A. 135). If they are not satisfied with any phase of the investigation, they order remedial measures by directing detailed written instructions to the appropriate personnel at the Huntington and White Plains offices (J. A. 135-139; J. E. 15-20; 34-45). DCO claims account for a substantial proportion of the settlement monies paid by the Huntington and White Plains offices (J. E. 26-33; 46-47).[6]

The Branch Claims Managers at Huntington and White Plains are lower echelon supervisors who report to and are directly responsible to Mr. Gregory (J. A. 31; 84; J. E. 2). Primarily, their duties involve supervising the adjustment of claims within the narrow outlines of the Metropolitan Department's policies (J. A. 84). Their responsibilities do not involve any significant element of judgment as to personnel and labor relations. The Branch Claims Managers do not have authority to hire, to promote, to discharge or even to impose most lower forms of discipline without the prior express approval of the Departmental Claims Manager, Mr. Gregory (J. A. 84-85; 111-114; 127-128; 219). Nor can they schedule vacations or change the settlement authority of Adjusters or Supervising Adjusters except with Mr. Gregory's approval (J. A. 129; 134). The Branch Claims Managers can only make recommendations to the Departmental Claims Manager with regard to all these personnel matters, and it is not unusual for the Departmental Claims Manager to alter or reject the recommendations (J. A. 89; 111-114; 127-129; 134). For example, since becoming Departmental Claims Manager, Mr. Gregory has on three separate occasions received a recommendation from his Huntington Branch Manager that he hire a particular applicant to fill a vacancy at that office. Mr. Gregory rejected each recommendation. He finally filled the vacancy by transferring an Adjuster from the New York City branch office to the Huntington branch office (J. A. 112-114).

[6] During April and May of 1967 about 54 per cent of the settlement monies paid by the Huntington office and about 32 per cent of the settlement monies paid by the White Plains office were for DCO claims (J. E. 26-33; 46-47).

### D. The Middle Department

The Middle Department is another principal administrative division of petitioner. The Middle Department handles all of petitioner's business in Pennsylvania, New Jersey, West Virginia, Maryland, Delaware, the District of Columbia, and several counties of northern Virginia (J. A. 166; J. E. 48).

All general executive and staff functions for the Department are performed at the Departmental Office at 10 Park Place, Newark, New Jersey. The Departmental Office is administrative headquarters for the various branch offices throughout the Departmental territory (J. A. 20; 166-167; 183). In addition to the headquarters at 10 Park Place, the Departmental Claims Office consists of nine branch claims offices located respectively, in Newark and Perth Amboy, New Jersey; Baltimore, Maryland; Charleston, West Virginia; Washington, D. C.; and Allentown, Harrisburg, Pittsburgh and Philadelphia, Pennsylvania. Each of these branch claims offices processes, investigates, adjusts and settles various types of claims within different geographic territories (J. A. 170-171; 182; 185).

As in the Metropolitan Department, supervisors in the Departmental Claims Office for the Middle Department actively direct and control the operations of all its nine branch offices (J. A. 166-167; 185). Each office must report its claims activity to the Departmental Office each month (J. A. 184-185). Each office must also receive approval from the Departmental Office for the settlement of all claims that qualify for "DCO Reporting". In addition, supervisory personnel from the Departmental Office regularly visit the branch offices to review their claims procedures (J. A. 182-183).

The Middle Departmental Claims Office similarly exercises tight control in the area of personnel and labor relations. The Departmental Claims Manager, Mr. William E. Carberry, like his counterpart Mr. Gregory in the Metropolitan Department, makes all the final decisions to hire, to fire, and to grant wage increases (J. A. 184-185; 194-195).

The Branch Claims Managers can only propose that such action be taken, and approval of even these limited proposals is not always given *(Ibid.)*.

## REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the decision below conflicts in both reasoning and result with decisions in the First[7], Fifth[8], Seventh[9], and District of Columbia[10] Circuits concerning what group of employees constitutes an appropriate bargaining unit in the insurance and retail industries. This conflict unsettles the administration of the National Labor Relations Act with respect to millions of employees in those industries.[11] It is essential, therefore, that this Court grant review to resolve that conflict.

### I. There Are No Precise Statutory or Judicial Guidelines for Unit Determinations

The National Labor Relations Act contains only two vague standards to guide the Board's unit determinations. Section 9(b) directs the Board "to assure to employees the fullest freedom in exercising the rights guaranteed" by the Act. Among those rights are the right to organize, the right to bargain collectively, and the right to engage in concerted activities, as well as the "right to refrain from any and all such activities." National Labor Relations Act § 7, 29 U. S. C. § 157 (1964). On the other hand, Section 9(c)(5) forbids the Board to be controlled in its bargaining unit determinations by "the extent to which the employees have organized. . . ."

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[7] *N. L. R. B.* v. *Purity Food Stores, Inc.*, 376 F. 2d 497 (1st Cir. 1967), *cert. denied*, 389 U. S. 959 (1967).

[8] *N. L. R. B.* v. *Davis Cafeteria, Inc.*, 396 F. 2d 18 (5th Cir. 1968).

[9] *N. L. R. B.* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F. 2d 895 (7th Cir. 1966).

[10] *Local 1325, Retail Clerks* v. *N. L. R. B.*, —— F. 2d ——, 71 L. R. R. M. 2721 (D. C. Cir. 1969).

[11] There are more than one million employees in the insurance industry and more than ten million employees in the retail industry. See 15 *Employment and Earnings and Monthly Report on the Labor Force*, No. 12, 49-50 United States Department of Labor, Bureau of Labor Statistics (Joseph M. Finerty, June 1969); *Life Insurance Fact Book 1969*, 94-95 (Institute of Life Insurance, N. Y., 1969).

In *N. L. R. B.* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438, 442 (1965), this Court held that Section 9(c)(5) does not prohibit the Board "from considering the extent of organization as one factor, though not the controlling factor, in its unit determination." This Court, however, has not as yet decided what other factors the Board properly may consider and what weight the Board may place on them[12]. This case presents this Court with the opportunity finally, and conclusively, to resolve the conflicts and to eliminate the difficulties that various courts of appeals have encountered in evaluating the correctness and weight to be accorded the factors the Board relies on in its insurance and retail unit determinations: specifically, what weight, if any, must the Board and courts of appeals give to five recurring "factors" in these cases—(1) the lack of authority of branch managers to resolve issues that are subjects of collective bargaining, (2) the extent to which an employer's operation is centrally controlled and coordinated, (3) the distance among the branches of an employer's administrative division, (4) the employer's absence of a history of collective bargaining and (5) the extent to which employees are interchanged among various branches of an employer's administrative division.

## II. The Decision Below Is In Conflict With Decisions of the First, Fifth, Seventh and District of Columbia Circuits With Regard to What Factors Are Relevant to Unit Determinations and the Weight That Should Be Accorded to Each of Them

Petitioner urges that a patent conflict among the circuits has resulted simply because the Board itself, and the reviewing courts of appeals, in turn, have lacked this Court's guidance on what factors are relevant to unit determinations and the relative weight each factor should be accorded. More particularly, the Second Circuit in the present case paid little heed to the critical factor that petitioner's branch managers are merely lower echelon super-

[12] *Packard Motor Car Co.* v. *N. L. R. B.*, 330 U. S. 485, 491, (1947), should not bar the grant of certiorari here. This Court need not lay down an "absolute rule of law" to give the courts of appeals and the Board the guidance their conflicting decisions show they need.

visors who possess no final authority with regard to such material subjects of collective bargaining as hiring, firing, wages, promotions and vacations and, with respect to discipline, have final authority to impose only minor punishment. The Second Circuit also gave almost no weight to the high degree of centralization with which petitioner conducts its operations. Rather, it accorded unwarranted weight to the petitioner's lack of collective bargaining history, to the mere 25 mile distance separating the three branches of petitioner's Metropolitan Department and to the small number of temporary transfers among the branches of the Metropolitan and Middle Departments.

In marked contrast to the approach the Second Circuit took here, the Seventh Circuit in *Frisch's supra*, refused to uphold the Board's determination that a single restaurant in an integrated chain was an appropriate bargaining unit primarily because the restaurant manager's authority did "not involve any significant element of judgment as to employment relations." 356 F. 2d at 897. Indeed, although petitioner's branch managers lack even the power to hire that Frisch's managers possessed, the Second Circuit nevertheless discounted the managerial authority factor and sustained the Board's unit determination.

The decision of the Second Circuit in this case conflicts even more markedly with that in *Davis, supra.* In *Davis,* the Fifth Circuit grounded its rejection of the Board's designation of two separate units, each consisting of a single cafeteria in the metropolitan area of the same city, chiefly on the local manager's lack of "authority to decide questions which would be the subject of collective bargaining." 396 F. 2d at 21. Significantly, the Fifth Circuit reached this result even though the local managers had authority to hire, fire and discipline employees. The Second Circuit, on the other hand, accorded little weight to the fact that petitioner's branch managers possess no such authority whatsoever and upheld the Board's unit determinations.

The decision of the court below likewise conflicts with the First Circuit's decision in *Purity, supra.* In *Purity,* the First Circuit regarded the absence of authority of the company's store managers with respect to subjects of collective bargaining to be "of primary significance" in setting aside the Board's determination that one of seven supermarkets in an integrated chain constituted an appropriate bargaining unit. In contrast, the Second Circuit placed little significance on the fact that petitioner's branch managers do not have even the slight final authority to hire and to discharge that the managers in *Purity* had.

Moreover, in *Davis, Purity, Frisch's* and this case, each court affirmed the Board's finding that each employer conducted a highly centralized multi-facility operation and performed almost all administrative functions at a central administrative office. However, while the courts in *Davis, Purity* and *Frisch's* accorded considerable significance to this finding, the court below gave it almost no weight.

The Second Circuit's appraisal of the geographic proximity factor in this case also conflicts markedly with that of the First Circuit in *Purity, supra,* and with that of the Fifth Circuit in *Davis, supra.* In *Purity,* the First Circuit set aside the Board's determination that one of seven supermarkets, all located within a 30-mile radius of the company's central office, constituted an appropriate bargaining unit. In so holding, the court reasoned that "[t]he 'independence' of the stores . . . amounts to *no more than a few miles of physical separation* and the consequent division of a few ministerial responsibilities." 376 F. 2d at 501 (emphasis added). Similarly, the Fifth Circuit in *Davis* quoted this very language in rejecting the Board's determination that two of eight cafeterias, all located within a twenty-five mile radius of the Company's central district office,[13] constituted two separate appropriate bargaining units. Here, the Second Circuit, faced with the same or less distance

[13] See *Davis Cafeteria, Inc.,* 160 N. L. R. B. 1141, 1142 (1966).

among the branches of the Metropolitan Department than the First and Fifth Circuits faced in *Purity* and *Davis*, reasoned that those branches "are not so geographically compact as to call for a Department-wide unit."[14] 409 F. 2d at 729.

Furthermore, the Second Circuit's evaluation of the absence of collective bargaining history is in direct conflict with that of the Fifth, Seventh and District of Columbia Circuits in the *Davis, Frisch's* and *Local 1325* cases. In *Local 1325*, the District of Columbia Circuit regarded the employer's absence of collective bargaining history as being "not relevant" to its conclusion that the Board's determination that a state-wide unit of drug stores was unjustified. 71 L. R. R. M. at 2726 n. 17. It appears clear that the courts of appeals in both *Davis* and *Frisch's* reached the same conclusion, since, in rejecting the Board's single unit determinations, they failed to even mention the Board's finding in each case of an absence of bargaining history.[15] In this case, however, the Second Circuit accorded significance to petitioner's lack of collective bargaining history when it stated that "a Branch unit of claims adjusters, examiners, and investigators does not conflict with any previous department-wide unionization of other Company employees." 409 F. 2d at 729.

A similar conflict exists with respect to the relevance and weight to be accorded an interchange of personnel. Although the Board found that there was, at best, minimal interchange of personnel among the branches involved in *Davis* and *Frisch's*,[16] the courts of appeals on review apparently considered that finding to be without significance since they failed to even mention it in their opinion. On the other hand, the Second Circuit in this case gave unwarranted weight to the fact that the number of temporary transfers among the branches was small.

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[14] There is considerably greater distance among the branches of the Middle Department and hence no conflict exists with regard to this factor for those branches.

[15] *Davis Cafeteria, Inc.*, 160 N. L. R. B. 1141, 1142 (1966); *Frisch's Big Boy Ill-Mar, Inc.*, 147 N. L. R. B. 551, 552 (1964).

[16] *Davis Cafeteria, Inc.*, 160 N. L. R. B. 1141, 1142 (1966) ("little or no employee interchange" found); *Frisch's Big Boy Ill-Mar, Inc.*, 147 N. L. R. B. 551, 552 (1964) (temporary employee transfers found "to be minimal").

Certainly, no one factor is conclusive in determining the appropriate bargaining unit in the insurance and retail industry. Still, the evaluation of factors should be consistent where the facts are substantially identical. As we have pointed out above, the evaluation of the courts of appeals in the *Purity, Davis, Frisch's* and *Local 1325* cases conflicts with the Second Circuit's evaluation in this case. Unless this Court gives guidance to the courts of appeals and the Board with respect to what factors they may consider and the relative weight they may accord to each, the conflict will continue.

## III. The Present Conflict Is Unsettling the Board's Administration of the National Labor Relations Act

The determination of bargaining units for employees in the insurance and retail industries is a principal and vitally important function of the Board under the National Labor Relations Act.[17] Indeed, this Court has itself noted "the importance of the 'appropriate unit' problem in the administration of the Act." *Pittsburgh Plate Glass Co.* v. *N. L. R. B.*, 313 U. S. 146, 149 (1941). The confusion and uncertainty that the present conflict among the circuits necessarily breeds is likely to impair the expeditious processing of representation cases in these industries by voluntary agreement between unions and employers with respect to the appropriate bargaining unit. The Board relies heavily on such voluntary agreements to process the growing number of representation petitions filed with it.[18] The lack of certainty with respect to the factors to be considered by the Board and the weight to be accorded each factor can only lead to fewer agreements between unions and employers with respect to the appropriate bargaining unit and to a

[17] See Note, *The Board and Section 9 (c) (5): Multilocation and Single-location Bargaining Units in the Insurance and Retail Industries*, 79 HARV. L. REV. 811, 812-813 (1966); see generally Hall, *The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free Choice*, 18 W. RES. L. REV. 479 (1967); Rains, *Determination of the Appropriate Bargaining Units by the NLRB: A Lack of Objectivity Perceived*, 8 B. C. IND. & COM. L. REV. 175 (1967).

[18] 32 *NLRB* ANN. REP. 1 (1967).

substantially increased work load for the Board which can unsettle its administration of the Act. In this context further clarification of the factors relevant to unit determinations and the relative significance that can be accorded to each of them is essential. Petitioner respectfully submits that the instant case presents an ideal vehicle for this Court to provide these necessary guidelines and to prevent the needless litigation before the Board and the courts of appeals to which this conflict gives rise.

## CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

FREDERICK T. SHEA
*Attorney for Petitioner,*
350 Park Avenue
New York, New York 10022

IRVING BRAND,
KELLEY DRYE NEWHALL
MAGINNES & WARREN

*Of Counsel*

# APPENDIX A

## Statutes

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. §§ 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer——

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

(5) to refuse to bargain collectively with the representatives of his employees * * *.

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *.

(c)(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

## *Appendix A*

### Prevention of Unfair Labor Practices

Sec. 10. * * *

(e) The Board shall have power to petition any court of appeals of the United States * * * for the enforcement of such order * * *. Upon the filing of such petition, the court * * * shall have power * * * to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * * Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction * * * to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

# APPENDIX B

## Opinions and Judgment Below

## UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 237, 238—September Term, 1968.

(Argued February 6, 1969 Decided April 15, 1969.)

Docket Nos. 32550, 32673

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CONTINENTAL INSURANCE COMPANY,

*Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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Before:

ANDERSON and FEINBERG, *Circuit Judges,* and MANSFIELD, *District Judge.**

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Petition by employer to review NLRB's order to bargain because of inappropriate bargaining unit, and cross-petition by NLRB for enforcement. Petition for review denied and enforcement granted.

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FREDERICK T. SHEA, Esq., New York, N. Y. (Kelley, Drye, Newhall, Maginnes & Warren, and Irving Brand, Esq., New York, New York, on the brief), *for Petitioner.*

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* Of the Southern District of New York, sitting by designation.

*Appendix B*

PAUL J. SPIELBERG, Esq., National Labor Relations Board (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate Gen. Counsel, Marcel Mallet-Prevost, Assistant Gen. Counsel, and Hans J. Lehmann, Esq., National Labor Relations Board, on the brief), *for Respondent.*

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ANDERSON, *Circuit Judge:*

Continental Insurance Company is a New York corporation engaged in the sale and service of casualty, property and life insurance throughout the United States and Canada. The Company conducts its operations regionally through nine Departments, each serving a different geographic area.[1] Each Department underwrites insurance risks and issues insurance policies; it also evaluates, processes and settles claims through Branch Claims Offices located throughout the Department's territory.

On May 4, 1967, the American Communications Association, Communications Trade Division, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America filed with the National Labor Relations Board a petition seeking to represent all claims adjusters, examiners and investigators in the Company's New York City Branch Claims Office, which is one of three claims offices serving the Metropolitan New York City Department.[2] Shortly thereafter the Union petitioned for representation of the same groups of employees in the Newark and Perth Amboy, New Jersey, Branch Claims Offices, which are two of nine such offices serving the Middle Department.[3]

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[1] These are the Eastern, Metropolitan New York City, Middle, Southeastern, Buckeye, Western, Southwestern, Pacific and Canadian Departments.

[2] The Metropolitan New York City Department serves New York City and Westchester, Rockland, Putnam, Nassau and Suffolk counties. There are Branch Claims Offices in Huntington and White Plains in addition to the one in New York City.

[3] The Middle Department handles Company business in Pennsylvania, New Jersey, West Virginia, Maryland, Delaware, the District of Columbia and parts of Virginia. There are Branch Claims Offices in Baltimore, Maryland; Charleston, West Virginia; Washington, D. C.; and Allentown, Harrisburg, Pittsburgh and Philadelphia, Pennsylvania as well as in Newark and Perth Amboy, New Jersey.

*Appendix B*

After a hearing on the consolidated petitions, the Board, on February 1, 1968, ruled that a unit of claims adjusters, examiners and investigators at each of the three Branch Claims Offices was appropriate for purposes of collective bargaining and issued a direction of election. A short time later, the Union lost the election at Perth Amboy but won at both the New York City and Newark offices.

Upon receiving official certification on March 6, 1968, the Union requested recognition and bargaining, but the Company refused to bargain on grounds that the designated units were inappropriate, being limited to single Branch Claims Offices and improperly including claims adjusters. The Board rejected these arguments, held that the Company's interference with employees in the exercise of their rights and refusal to bargain were violations of §§ 8(a)(1) and (5) of the National Labor Relations Act, and ordered the Company to cease and desist from its unlawful conduct and to bargain with the Union upon request.

The principal issue in this petition for review and cross-petition for enforcement is the validity of the Board's decision that the single Branch Claims Offices were appropriate units for collective bargaining. Section 9(b) of the Act places in the hands of the Board the responsibility for making such unit determinations, which, in view of the large measure of informed discretion involved, are to be disturbed only if arbitrary and unreasonable. *Packard Motor Car Co.* v. *Labor Board,* 330 U. S. 485 (1947); *NLRB* v. *St. John's Associates, Inc.,* 392 F. 2d 182 (2 Cir. 1968); *NLRB* v. *Sunrise Lumber & Trim Corp.,* 241 F. 2d 620, 624 (2 Cir.), *cert. denied,* 355 U. S. 818 (1957).

As noted in *Solis Theatres* v. *NLRB,* 403 F. 2d 381 (2 Cir. 1968), we are not unmindful of the difficulties involved in making unit determinations that, on the one hand, effect the policy of the Act to assure employees the fullest freedom in exercising their rights and, on the other hand, respect the interest of an integrated multi-unit employer in maintaining enterprise-wide labor relations. Each case necessarily requires a balancing of the interests of employer

and employees. In this case, we are satisfied that there is substantial evidence in the record to support the Board's determination of that issue.

Each of Continental's nine Departments is headed by a Departmental Manager who bears overall responsibility for Company business within the Department. He is assisted by second-level managers in charge of each of the several functions of the Department—e.g. the claims function is overseen by a Departmental Claims Manager. In addition, each Branch Claims Office is under the supervision of a Branch Claims Manager who is responsible to his respective Departmental Claims Manager. The Metropolitan New York City Department is unique among Continental's Departments because its Departmental Claims Office also serves as the New York City Branch Claims Office.

Continental's operations are in many respects highly centralized in the Company's Home Office or in the Departmental Offices. For example, claims exceeding a specified amount are closely supervised by Departmental personnel. Moreover, final decisions concerning labor relations matters, such as hiring, firing and granting of raises are made at these higher levels in the Company. On the other hand, it is clear from the record that each Branch Claims Office in question is a separate autonomous unit, enjoying complete control over the processing of the vast majority of claims. In addition, the Branch Claims Managers possess considerable influence in the final decisions with respect to the personnel matters described above.

On the basis of *Solis Theatres, supra* at 383, however, the Company argues that the Branch Claims Office is an inappropriate bargaining unit because, despite their influence, the Branch Claims Managers lack ultimate "authority to resolve issues which would be the subject of collective bargaining." But the Company's reliance on *Solis Theatres* is misplaced, for its interpretation of that decision would permit any employer to impede unionization merely by centralizing final decisions on labor policies. While the theatre manager's liability to resolve bargain-

ing issues was a significant consideration in *Solis Theatres,* there were additional factors which militated against the Board's decision. For example, the theatre itself could not fairly be characterized as autonomous because its manager lacked decision-making authority in other areas of operation and administration; nor was the designated unit geographically isolated, as there were two other Interboro theatres nearby. Also the pattern of previous and existing unionization of other Interboro theatre employees was circuit-wide. Indeed, on about every test ordinarily prescribed by the Board, the single theatre unit was inappropriate. The holding of *Solis Theatres,* therefore, is that the Board may not, without substantial justification, fractionate a multi-unit operation whose labor policy is centrally directed and administered.

We cannot say that the Board lacked such justification in this case. As noted, each Branch Claims Office enjoys substantial administrative autonomy, and each Branch Manager exerts considerable influence on final decisions in labor matters. Also, the Branch Offices in the Metropolitan Department and especially in the Middle Department are not so geographically compact as to call for a Department-wide unit. Nor was there any significant number of temporary transfers among the Branches. Finally, a Branch unit of claims adjusters, examiners and investigators does not conflict with any previous department-wide unionization of other Company employees. This case is therefore readily distinguishable from the somewhat unusual situation in *Solis Theatres.*

Furthermore, the Company's reliance upon *NLRB* v. *Davis Cafeteria, Inc.,* 396 F. 2d 18 (5 Cir. 1968); *NLRB* v. *Purity Food Stores, Inc.,* 376 F. 2d 497 (1 Cir. 1967) and *NLRB* v. *Frisch's Big Boy Ill-Mar, Inc.,* 356 F. 2d 895 (7 Cir. 1966) is equally misplaced. Those cases involve factual situations different from those present here. While the opinions in those cases placed a great weight on the ability of the unit manager to resolve labor relations matters, they showed an awareness of circumstances which would justify fractionating an employer's organization.

*Appendix B*

In *Davis Cafeteria, supra* at 21 n. 6, the court factually distinguished, but noted without criticism, cases in which the unit managers had considerable leeway to implement the Company's business programs, in which the unit was geographically remote, or in which there was an almost complete absence of interchange of personnel between units. In *Purity Food Stores, supra,* at 501 n. 4, the court found factually inapplicable a case in which the unit manager had broad authority to purchase items and to hire and fire employees. See also *Banco Credito y Ahorro Ponceno* v. *NLRB,* 390 F. 2d 110 (1 Cir. 1968) where the First Circuit further limited its language in *Purity Food Stores.* And, in *Frisch's Big Boy, supra* at 896 n. 3, the court implied that geographic isolation could justify a separate unit, even though the unit manager did not have the power to decide matters which are customarily the subjects of collective bargaining. Also, to the extent that *State Farm Mutual Automobile Insurance Co.* v. *NLRB,* —— F. 2d ——, 68 LRRM 3029, motion for rehearing *en banc* granted (7 Cir. 1968) gives conclusive weight to the single factor of the company's administrative structure and organization we choose not to follow it.

Finally, there was reasonable ground for the Board to refuse to treat the Company's insurance adjusters as managerial employees, an exempt group defined by the Board as "those who formulate, determine, and effectuate an employer's policies." *American Federation of Labor,* 120 N. L. R. B. 969, 973 (1958). The Board's rejection of this claim was well within the reasonable exercise of its discretion. It cannot be held to have acted arbitrarily in deciding that adjusters, whose scope of authority empowered them to pledge their employer's credit from $100 to $2500, are not engaged in policy-making activities.

The petition for enforcement is granted, and the employer's petition for review is denied.

# UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**No. 32,550 & 32,673**

CONTINENTAL INSURANCE COMPANY,
*Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## Judgment

Before: ANDERSON and FEINBERG, Circuit Judges, and MANSFIELD, District Judge.*

THIS CAUSE came on to be heard upon the petition of Continental Insurance Company to review the order of the National Labor Relations Board issued against Petitioner, its officers, agents, successors, and assigns on June 26, 1968, and upon cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on February 6, 1969, and has considered the briefs and the transcript filed in this cause. On April 15, 1969, the Court being fully advised in the premises, handed down its decision granting enforcement of Board's Order and denying the employer's petition for review. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the said order of the National Labor Relations Board in said proceeding be enforced, and that Continental Insurance Company, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

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* Of the Southern District of New York, sitting by designation.

*Judgment*

IT IS FURTHERED ORDERED, that costs shall be taxed against the Petitioner.

ROBERT P. ANDERSON

.....

Judge, United States Court of Appeals for the Second Circuit

WILFRED FEINBERG

.....

Judge, United States Court of Appeals for the Second Circuit

Filed: May 12, 1969

## Decision and Order

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 2-CA-11531

CONTINENTAL INSURANCE COMPANY,
Employer,

*and*

AMERICAN COMMUNICATIONS ASSOCIATION, COMMUNICATIONS TRADE DIVISION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner.

Upon a charge filed by American Communications Association, Communications Trade Division, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 2, issued a complaint dated March 29, 1968, against Continental Insurance Company, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served upon the Respondent.

With respect to the unfair labor practices, the complaint alleges, in substance, that on or about March 6, 1968, the Union was duly certified by the Regional Director for Region 2 as the exclusive bargaining representative of the Respondent's employees in certain appropriate units and that, on or about March 13, 1968, and thereafter, the Respondent refused to recognize or bargain with the Union

as such exclusive bargaining representative although the Union requested the Respondent to do so.

On April 16, 1968, the Respondent filed an answer, denying the commission of the unfair labor practice alleged.

On or about April 18, 1968, the General Counsel filed with the Regional Director a Motion for Summary Judgment and a supporting memorandum, asserting that there were no issues of fact or law which had not already been litigated before and determined by the Board in its Decision and Direction of Elections in a prior representation case,[1] and requesting an appropriate order remedying the violations as alleged in the complaint. Thereafter, on April 23, 1968, the Board issued an Order Transferring Proceeding to the Board and Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Pursuant thereto, the Respondent filed a statement in opposition to the motion and a cross-motion to transfer the case to a Trial Examiner for hearing.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board makes the following:

Ruling on the Motion for Summary Judgment

The record before us establishes that on May 4, 1967, the Union filed a petition in Cases Nos. 2-RC-14651 and 2-RC-14679 seeking to represent certain appropriate units of claims adjusters, examiners, and investigators employed by the Respondent in New York City, N. Y., and Newark, N. J., and Perth Amboy, N. J. After a hearing, the Board issued the aforesaid Decision and Direction of Elections on February 1, 1968, in which it found appropriate bargaining units of claims adjusters, examiners, and investigators employed by the Respondent in New York City, N. Y., and

[1] 169 NLRB No. 85.

Newark, N. J., excluding all other employees and supervisors as defined in the Act.

In or about February 1968, elections were held in the New York City and Newark units, which the Union won. Thereafter, on March 6, 1968, the Regional Director certified the Union as the exclusive bargaining representative of the employees in each of the said units.

On March 7, 1968, the Union requested that the Respondent bargain with it. This request was refused, whereupon the Union filed the charges on which these proceedings are predicated.

In its statement in opposition to the Motion, Respondent again contends, *inter alia,* that the units certified to be appropriate by the Board are in fact inappropriate in that claims adjusters were improperly included in both units and that the New York City unit was improperly limited to one branch office.

It is well settled that in the absence of newly discovered or previously unavailable evidence a respondent, in a Section 8(a)(5) proceeding, is not entitled to relitigate issues which were or could have been litigated in the prior representation proceeding.[2] These contentions had also been raised, and were considered and rejected by the Board, in the representation case. Inasmuch as the Respondent has or could have litigated in the representation proceeding the issues it presently asserts, it has not raised any issue which is properly triable in the instant unfair labor practice proceeding.

As all material issues have been previously decided by the Board, or are admitted by the Respondent, there are no matters requiring a hearing before a Trial Examiner. Accordingly, the General Counsel's Motion for Summary Judgment is granted and the Respondent's cross-motion

[2] *Collins & Aikman Corp.,* 160 NLRB No. 135.

is denied.[3] On the basis of the record before it, the Board makes the following:

## Findings of Fact

### I. The Business of the Respondent

The Respondent, a New York corporation with headquarters located in New York City, New York, is engaged in the sale and servicing of casualty, property, and life insurance. During the past year, a representative period, the Respondent had a gross annual income from premiums in excess of $500,000, and during the same period purchased and caused to be transported and delivered in interstate commerce to various locations in the United States, directly from States of the United States other than the State in which it is located, goods and materials valued in excess of $50,000.

### II. The Labor Organization

American Communications Association, Communications Trade Division, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

### III. The Unfair Labor Practice

#### A. *The Representation Proceeding*

##### 1. The Units

The following employees of the Respondent constitute units appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

[3] Respondent's contention that the Board is powerless to act upon a motion for summary judgment has no basis in law or policy. When there are no questions of fact to be determined, and the issues to be resolved are only matters of law, the Board is inherently empowered to grant such a motion. See *E-Z Davies Chevrolet,* 161 NLRB No. 121.

(a) All New York City branch claims adjusters, examiners and investigators, excluding office, clerical, managerial, confidential, and professional employees, and guards, supervisory adjusters, and other supervisors as defined in the Act.

(b) All Newark branch claims adjusters, examiners, and investigators excluding office, clerical, managerial, confidential, and professional employees, and guards, supervisory adjusters, and other supervisors as defined in the Act.

2. The Certifications

In or about February 1968, a majority of the employees of the Respondent voting in secret ballot elections conducted among the employees in said units, under the supervision of the Regional Director for Region 2, designated the Union as their representative for the purpose of collective bargaining with the Respondent. On March 16, 1968, the Union was certified as the exclusive collective-bargaining representative of the employees in the said units and the Union continues to be such representative.

B. *The Request to Bargain and the Respondent's Refusal*

Commencing on March 7, 1968, and continuing to date, the Union has requested and is requesting the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described units. On March 13, 1968, and continuing to date, the Respondent did refuse, and continues to refuse, to bargain collectively with the Union as exclusive collective-bargaining representative of all employees in said units.

Accordingly, we find that the Respondent has, since March 13, 1968, refused to bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate units, and that, by such refusal, the Respondent has engaged in, and is engaging in,

unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act.

## IV. The Effect of the Unfair Practices Upon Commerce

The acts of the Respondent set forth in section III, above, occurring in connection with its operations as described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## The Remedy

Having found that the Respondent as engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate units and, if understandings are reached, embody such understandings in signed agreements.

## Conclusions of Law

1. Continental Insurance Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. American Communications Association, Communications Trade Division of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. All New York City branch claims adjusters, examiners, and investigators, excluding office, clerical, managerial, confidential, and professional employees, and guards, supervisory adjusters, and other supervisors as defined in the Act; and all Newark branch claim adjusters, examiners,

and investigators excluding office, clerical, managerial, confidential, and professional employees, and guards, supervisory adjusters, and other supervisors as defined in the Act, constitute units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since March 6, 1968, the above-named labor organization has been the exclusive representative of all employees in the aforesaid appropriate units for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on March 13, 1968, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees in the appropriate units, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Continental Insurance Co., New York City, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment, with

American Communications Association, Communications Trade Division, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate units:

1. All New York City branch claims adjusters, examiners, and investigators, excluding office, clerical, managerial, confidential, and professional employees, and guards, supervisory adjusters, and other supervisors as defined in the Act.

2. All Newark branch claims adjusters, examiners, and investigators excluding office, clerical, managerial, confidential, and professional employees, and guards, supervisory adjusters, and other supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization, as the exclusive representative of all employees in the aforesaid appropriate units with respect to wages, hours, and other terms and conditions of employment, and if understandings are reached, embody such understandings in signed agreements.

(b) Post at its place of business in New York City, New York, and Newark, New Jersey, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by the Respondent, shall be posted immediately upon receipt thereof, and be maintained by the Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken

by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director for Region 2, in writing, within 10 days from the date of this Decision and Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., June 26, 1968.

FRANK W. MCCULLOCH,
*Chairman*

GERALD A. BROWN,
*Member*

HOWARD JENKINS, JR.,
*Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

## Decision and Direction of Elections

New York, N. Y.
Newark and Perth Amboy, N. J.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

**Case Nos. 2-RC-14651, 2-RC-14679 (formerly 22-RC-3696)**

CONTINENTAL INSURANCE COMPANY,

Employer,

*and*

AMERICAN COMMUNICATIONS ASSOCIATION, COMMUNICATIONS TRADE DIVISION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner.

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a consolidated hearing was held before Hearing Officer Raymond P. Green.

Pursuant to Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Thereafter, the Employer and the Petitioner filed briefs in support of their position.

The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent certain employees of the Employer.

3. Questions affecting commerce exist concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and 2(6) and (7) of the Act.

4. The Employer is engaged in all phases of the sale and service of casualty, property, and life insurance throughout the United States and Canada. Its home office is located in New York City, New York. Regionally, the Employer operates through nine departments, each one servicing a different geographic area of the United States and Canada: The Eastern, Metropolitan New York City, Middle, Southeastern, Buckeye, Western, Southwestern, Pacific, and Canadian Departments.

The Metropolitan New York City Department consists of three branch claims offices located within 25 miles of each other; New York City, Huntington, and White Plains.

The Middle Department consists of nine branch claims offices: Newark and Perth Amboy in New Jersey; Baltimore, Maryland; Charleston, West Virginia; Washington, D. C.; and Allentown, Harrisburg, Pittsburgh, and Philadelphia, Pennsylvania.

With respect to the Metropolitan Department, in Case No. 2-RC-14651, the Petitioner seeks a unit consisting of all claims adjusters, examiners, and investigators (herein called adjusters), and also the supervising adjusters in the New York City branch claims office. The Employer contends, initially, that the only appropriate unit is one that should also include the other two branches of the Metropolitan Department, Huntington, and White Plains.

With respect to Case No. 2-RC-14679, the Petitioner seeks two separate units of adjusters and supervising adjusters, one at the Employer's Newark, New Jersey, and the other at its Perth Amboy, New Jersey, claims office, both in the Middle Department. The Employer argues for a combined unit of all nine branch claims offices in the Middle Department.

*Decision and Direction of Elections*

All nine departments perform basically the same functions: selling insurance policies, and settling claims. Each department is headed by a departmental manager with overall responsibility for the Employer's business within his territory. At the branch office level there is a branch manager with twin responsibilities. He reports to the manager of his department and also to an official at the home office in charge of his particular operating function. At the Metropolitan New York City Department, Henry Gregory is the departmental manager. He is also the head of the New York City branch claims office. The other two branch offices are headed by branch claims managers who report to Gregory in his capacity as department manager.

In opposing the unit sought by Petitioner in Case No. 2-RC-14651, the Employer contends that the smallest relatively autonomous unit of its claims structure is composed of claims employees from all three branches making up the department. It argues that the centralized control exerted over White Plains and Huntington by the same personnel as exercise control of the New York City branch office compels this conclusion. This control, the Employer argues, is manifested in various ways. Thus, one of the Employer's exhibits reveals that between November 4, 1966, and May 11, 1967, supervisors from the New York City office in their departmental capacity made 40 full-day visits to the other two branches. These visits were primarily for the purpose of improving claims processing procedures and occasionally would include the settlement of certain claims. These visits, however, represent no more than a normal degree of departmental supervision over the activities of a subordinate body. One would expect this degree of supervision to be exercised by any regional office over a district office.

As evidence of employee interchange, the Employer presented evidence that out of a group of approximately 110 claims employees in the three branches there have been about 40 non-promotional transfers since 1960. Most of these transfers, however, were permanent, and not tempo-

rary interchanges; and the few temporary interchanges were virtually all to a World's Fair branch which was set up for a specific purpose and for a limited time.

The Employer relied heavily on the fact that claims of a certain category, arising at the branch offices, denominated DCO reporting claims, are closely supervised by personnel from the Metropolitan Department headquarters. The branch office places what is called a reserve on each claim that it receives. DCO claims are those claims in which the estimated liability, the reserve, exceeds a certain stated amount. The department headquarters keeps a separate file on all DCO claims. The record reveals that the non-DCO claims far exceed DCO claims both numerically and in monies paid. All such non-DCO claims are handled exclusively at the branch office levels. Therefore, it is quite clear that, in the vast majority of claims processed to conclusion, the branch offices are in complete control.

It is true, as the Employer contends, that such personnel policies as hiring, firing, and the granting of raises are quite centralized, and final authority in these areas resides in the person of Departmental Manager Gregory. It appears, though, that the initiation of all such actions occurs at the branch level, and they are generally approved.

Although the Employer's claims operations are performed with a substantial degree of centralized control and coordination, we nevertheless do not agree that these attributes of company structure are sufficient to defeat the appropriateness of a separate bargaining unit covering the New York City branch claims office. Notwithstanding the centralization in certain areas, it appears clear to us that the Employer's other two branch offices in the Metropolitan Department are, to a large extent, separate entities. They are responsible directly and individually to the department head. Their claims processing activities are, to a substantial degree, performed subject only to the supervision of the local branch manager who is responsible for day-to-day operations. As indicated above, the great majority of claims are settled exclusively by the branch claims office.

We have also noted the absence of any significant amount of temporary interchange among nonsupervisory personnel among the branch offices. There is likewise no evidence of any uniformity of wage structure among the three branches.

In view of the above facts, we are of the opinion that the Employer's New York branch office possess sufficient autonomy and separate identity to make it an appropriate unit for collective bargaining. We see no warrant here for departing from our customary position in such cases.[1]

As we observed in Utica Mutual, a factually similar case, "Neither the fact that the regional offices merely implement centrally promulgated policies nor the fact that the home office performs a variety of services in support of regional operations, nor the fact that the actual activities carried on in the regional offices are to an extent duplicated, controlled, or assisted by the home office defeat the separate identity of the Employer's branch claims offices." The Employer's other arguments in support of its contention for a departmental unit have been considered but do not appear to be meritorious.

In Case No. 2-RC-14679, many of the same considerations control in determining whether Newark and Perth Amboy in the Employer's Middle Department are separately appropriate for collective-bargaining purposes. The record shows that each of these branches is separately autonomous in its operations. Neither reports to the other;

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[1] As we noted in *Utica Mutual Insurance Company*, 165 NLRB No. 105, "Since Section 9(b) specifically recognizes the validity of the plantwide unit, the Board has long held that a unit confined to a single manufacturing plant of a particular employer is presumptively appropriate. Moreover, where a district office in the insurance industry possesses the requisite autonomy, the Board has considered such office as the analogue of the single manufacturing plant." See, e.g., *Metropolitan Life Insurance Co. (Woonsocket, R. I.)*, 156 NLRB 1408. The Employer's reliance on *State Farm Mutual Automobile Insurance Co.*, 158 NLRB 925, appears to be misplaced. *State Farm* is clearly distinguishable, as the record in that case revealed that day-to-day supervision was exercised on a divisional, multioffice rather than a branch office basis, and that the various claims offices lacked sufficient autonomy to be separately appropriate.

there is separate supervision and virtually no employee interchange.

In view of the foregoing, we find that a unit limited to the New York City branch office of the Employer is appropriate for collective-bargaining purposes; and that two separate units limited to the Newark and Perth Amboy, New Jersey, branch claims offices are appropriate for collective bargaining.

We now examine the Employer's contention that supervisory adjusters should be excluded from any appropriate units as supervisors within the meaning of the Act. The Petitioner, although conceding that certain named individuals are supervisors, nevertheless maintains that the supervisory adjusters are not supervisors within the meaning of the Act.[2]

In the New York City branch office there are (excluding the stipulated supervisors) 13 supervisory adjusters. Of this number 12 are in the bodily injury section, and one is in the physical damage section. The other sections contain no supervisory adjusters.[3] The branch office contains approximately 43 adjusters, 6 compensation examiners, and 5 compensation investigators.

The dispute over the supervisory status of supervisory adjusters centers primarily on the bodily injury section where 12 of the 13 supervisory adjusters are located. Seven of these supervisory adjusters each have three adjusters assigned to them, and one has two adjusters assigned to him. Of the remaining five supervisory adjusters, two handle "foreign" claims and do not have any adjusters permanently assigned to them. They may, however, assign work to any adjuster in the office. One other supervisory adjuster plans to retire soon and has no men assigned to him while he completes his pending cases. Another super-

[2] We accept the stipulation reached in Case No. 2-RC-14651 that certain named individuals are supervisors within the meaning of the Act.

[3] The New York City branch office contains the following sections: bodily injury, physical damage, workmen's compensation, fire loss, burglary, and subrogation.

visory adjuster is new and will shortly be assigned adjusters. The only remaining supervisory adjuster, located in the physical damage section, performs essentially the same work as his counterparts in the bodily injury section.

For all relevant purposes the Newark and Perth Amboy offices are similarly structured, although Perth Amboy is too small to be divided into sections.

We are of the opinion that all of the supervisory adjusters in dispute are supervisors within the meaning of the Act.[4] We are aware that the label "supervisor" in itself is not controlling in deciding this issue. We have long held that supervisory status is determined by the actual duties performed.[5] However, it is not necessary to show that an individual has all the indicia of supervisory authority; it need only be shown that an individual possesses one or more of the indicia listed in the statutory definition to bring him within the scope of that definition.[6]

The record is clear that the supervisory adjusters responsibly direct the work of the adjusters assigned to them. When a claim is received by the office, it first goes to a supervisory adjuster who establishes a "reserve" for the claim. He then assigns it, using his discretion, to any of the adjusters assigned to him. At this time the supervisory adjuster gives directions to the adjuster with respect to what he wants done in connection with the claim. These instructions are often detailed. The adjusters are expected to comply with the instructions given them and failure to do so may result in disciplinary action.

Further, in any case which requires a settlement in excess of an adjuster's settlement authority, it is necessary

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[4] We are, however, unable to adopt the Employer's contention that all regular adjusters should be excluded from the unit because they are managerial employees. We reach this result for the reasons set forth in *Lumberman's Mutual Casualty Co. of Chicago*, 75 NLRB 1132.

[5] *Cooke & Jones*, 146 NLRB No. 192.

[6] *Clark O'Neil, Inc.*, 147 NLRB 370.

to secure the approval and authorization of the supervisory adjuster. Regardless of the adjuster's opinion on the value of the claim, the judgment of the supervisory adjuster is controlling.[7]

It appears to us that the nature of the direction exercised by the supervisory adjusters is of a responsible rather than a routine nature. Thus, although the amount of actual direction performed by a supervisory adjuster will vary depending on the experience and skill of the adjusters and the value of the claim, the supervisory adjuster is ultimately responsible for all the cases assigned to him. The evidence before us reveals that often when directing the settlement of an important case, the supervisory adjuster will independently establish the most appropriate course of action and will then require the adjuster to proceed in accordance with that judgment. These directions appear to be much more than ministerial or routine in nature.

In addition to their power to responsibly direct work, supervisory adjusters also have the power to, and do in fact, effectively recommend raises and promotions. Gregory testified in this connection that he "can't possibly review all of the files that are assigned to each one of these men (adjusters), and I have to rely upon the supervisory adjuster's recommendations, because he is more intimately involved on a daily basis, as contrasted to my periodic review." Further, Petitioner concedes that in late 1965 Gregory indicated to the supervisory adjusters that they could and should make such recommendations. Notwithstanding Petitioner's contention that these recommendations are no longer solicited, the transcript is replete with examples of recent written recommendations placed in the adjuster's personnel file and which have been favorably acted upon.

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[7] In this regard it is pertinent to note that where adjusters generally have about $250 in settlement authority, the settlement authority of supervisory adjusters is substantially higher, generally ranging between $2,500 and $3,500.

*Decision and Direction of Elections*

Both in the areas of work direction and effective recommendation of personnel action, the same factors which lead us to conclude that supervisory adjusters possess these powers in the New York City branch appear to be equally present in Newark and Perth Amboy.[8]

The question of whether supervisory adjusters possess any of the other indicia of supervisory status set forth in the Act is in sharp dispute. However, in view of our foregoing conclusions, we need not resolve these credibility issues. It is clear that supervisory adjusters possess at least two substantial indicia of supervisory status, and this is sufficient to exclude them from the unit.

There remains for consideration only the question of whether Lillian Simmons is a claims adjuster and hence to be included in the New York City unit. We find that Simmons is an office clerical and therefore should not be included in the unit.

On the basis of the foregoing and the entire record in this case, we find that the following constitute units appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

(1) All New York City branch claims adjusters, examiners, and investigators, excluding office, clerical, managerial, confidential, and professional employees, and guards, supervisory adjusters, and other supervisors as defined in the Act.

(2) All Newark branch claims adjusters, examiners, and investigators, excluding office, clerical, managerial, confidential, and professional employees, and guards, supervisory adjusters, and other supervisors as defined in the Act.

(3) All Perth Amboy branch claims adjusters, examiners, and investigators, excluding office, clerical, managerial,

[8] Unlike New York City where the practice was for written recommendations for salary increases to be submitted, in these two branches it appears that such recommendations were made orally.

confidential, and professional employees, and guards, supervisory adjusters, and other supervisors as defined in the Act.

## DIRECTION OF ELECTIONS

Separate elections by secret ballot shall be conducted among the employees in each of the units found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 2 shall direct and supervise the elections, subject to National Labor Relations Board Rules and Regulations. Eligible to vote are those in the units who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[9] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by American Communica-

[9] Election eligibility lists, containing the names and addresses of all eligible voters in the respective units, must be filed by the Employer with the Regional Director for Region 2 within 7 days from the date of this Decision and Direction of Elections. The Regional Director shall make these lists available to all parties to the elections. No extension of time to file these lists shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election or elections whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

tions Association, Communications Trade Division, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Dated, Washington, D. C. Feb. 1, 1968.

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Frank W. McCulloch, Chairman

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Gerald A. Brown, Member

.....
Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)